

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3                                   Case No.: 3:23-cv-00495-ART-CSD

4           BEAU BROWN,  
5                   Plaintiff

6                                   **Order**

7                                   Re: ECF Nos. 1-1, 3

8           v.

9           THE STATE OF NEVADA,  
10                   Defendant

11           Plaintiff initiated this action by filing a notice to the Attorney General that the action  
12 involves a challenge to the constitutionality of a state statute, referencing Nevada Revised  
13 Statutes 176.017, 176.025, and 213.12135. (ECF No. 1-1.) These are statutes that govern parole  
14 eligibility for persons convicted as adults but who were under 18 at the time the crime was  
15 committed. He subsequently filed an application to proceed *in forma pauperis* (IFP) for an  
16 inmate. (ECF No. 3.)

17           On January 12, 2024, the court issued an order indicating that it was unclear  
18 Plaintiff intended to proceed with a habeas petition—which challenges his conviction or sentence  
19 on constitutional grounds—or a civil rights action pursuant to 42 U.S.C. § 1983—which  
20 challenges his conditions of confinement, as Plaintiff had not filed either a habeas petition or a  
21 civil rights complaint. The court gave Plaintiff 30 days to file a notice indicating whether he  
22 wishes to proceed with a habeas petition or a civil rights action pursuant to section 1983, and,  
23 depending on how he elects to proceed, either a habeas petition or a civil rights complaint. The  
court will deferred ruling on his IFP application. (ECF No. 4.)

1 On January 22, 2024, Plaintiff filed a notice stating that he intended to proceed with an  
2 action challenging the constitutionality of a state statute under 28 U.S.C. § 2403(b) and Federal  
3 Rule of Civil Procedure 5.1, as opposed to a habeas petition or civil rights action under section  
4 1983. (ECF No. 5.) On February 1, 2024, he again filed a notice to the court of a challenge to  
5 the constitutionality of a state statute pursuant to 28 U.S.C. § 2403(b) and Federal Rule of Civil  
6 Procedure 5.1.

7 Neither 28 U.S.C. § 2403(b) nor Federal Rule of Civil Procedure 5.1 create a separate  
8 cause of action or basis for relief. *See Oscar Marques-Perez v. State of Nevada*, No. 2:22-cv-  
9 00796-GMN-DJA, 2024 WL 1434352, at \*2 (D. Nev. Apr. 2, 2024) (citations omitted); *Vance*  
10 *v. Los Angeles Dep't of Child Support*, No. CV 23-4392-DMG (BFM), 2023 WL 4681552, at \*2  
11 (C.D. Cal. June 7, 2023).

12 28 U.S.C. § 2403(b) provides a mechanism for intervention of a state in an action where a  
13 question is raised as to the constitutionality of a state statute and the state has not been named a  
14 party, and Rule 5.1 implements that statute by requiring a party filing such a pleading to file a  
15 notice which triggers the requirement for the court to certify the question to the appropriate  
16 attorney general.

17 Accordingly, the court will give Plaintiff an additional 30 days from the date of this  
18 Order to file a notice indicating whether he intends to proceed with a habeas petition  
19 (challenging his conviction or sentence) or a civil rights action under 42 U.S.C. § 1983  
20 (challenging his conditions of confinement as a result of the violation of a right secured by the  
21 Constitution or laws of the United States by a person acting under color of state law). If Plaintiff  
22 is challenging his sentence and seeking release as a result of the alleged unconstitutional statute,  
23 then he should pursue such relief in a habeas petition. If, however, he does not seek to invalidate

1 his conviction or sentence and does not seek relief, and the consequence of a finding that the  
2 statute in question is unconstitutional would not result in such relief, then Plaintiff should file an  
3 action under section 1983. If Plaintiff fails to timely file the notice and either a habeas petition or  
4 complaint under section 1983, the court will recommend dismissal of this action without  
5 prejudice.

6 The court also denies Plaintiff's pending IFP application (ECF No. 4) without prejudice.  
7 Within 30 days, Plaintiff must also file the applicable IFP application for either a habeas petition  
8 or 1983 action.

### 9 CONCLUSION

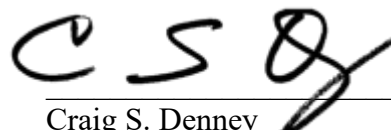
10 Plaintiff has **30 days** from the date of this Order to file a notice indicating whether he  
11 intends to proceed with a habeas petition or a civil rights action under section 1983, and a  
12 corresponding habeas petition or section 1983 civil rights complaint. Plaintiff's pending IFP  
13 application (ECF No. 4) is **DENIED WITHOUT PREJUDICE**. Also within **30 days** of this  
14 Order, Plaintiff must file the appropriate IFP application for either a habeas petition or civil  
15 rights action under 1983.

16 The Clerk shall **SEND** Plaintiff the instructions and forms for filing a habeas petition as  
17 well as a civil rights complaint, as well as the corresponding IFP applications for an inmate.

18 If Plaintiff fails to timely comply, it will be recommended that this action be dismissed  
19 without prejudice.

20 **IT IS SO ORDERED.**

21 Dated: April 9, 2024

22 

23 Craig S. Denney  
United States Magistrate Judge